June 23, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of *Ex Parte* Communication, MB Docket No. 13-236

Dear Ms. Dortch:

The national television ownership rule limits any single entity from owning commercial television broadcast stations reaching, in the aggregate, more than 39 percent of the total number of TV households in the nation.[1] For purposes of calculating audience reach under the national ownership cap, the FCC's rule discounts the reach of UHF stations.[2] In its 2013 rulemaking in the above-captioned docket, the Commission proposed to eliminate the UHF discount.[3] Particularly in light of the decision last month by the Third Circuit Court of Appeals,[4] the Commission cannot, consistent with law, adopt its proposal in a vacuum, without considering the national TV ownership rule and deciding whether an amended cap promotes the public interest.

As NAB explained in its comments in this proceeding, eliminating the UHF discount without addressing the national TV ownership rule would be arbitrary and capricious.[5] The UHF discount exists only as a calculation methodology for the national cap; it is not a stand-alone rule. Eliminating the discount would alter the national TV ownership rule by making it more stringent, thereby directly affecting TV licensees' ability to acquire or sell stations. It would be arbitrary and capricious for the FCC to remove the discount without acknowledging that it is

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[1] 47 C.F.R. § 73.3555(e)(1).

[2] 47 C.F.R. § 73.3555(e)(2)(i) (defining audience reach under the national TV ownership rule and stating that "[f]or purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market").

[3] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, FCC No. 13-123, MB Docket No. 13-236 (rel. Sept. 26, 2013) (Notice).

[4] *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866 (3d Cir. May 25, 2016) (*Prometheus III*).

[5] *See* Comments of NAB, MB Docket No. 13-236 (Dec. 16, 2013) (NAB 2013 Comments).

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amending the ownership rule itself;[6] without providing a reasoned analysis supported by the record for changing the national cap;[7] and without determining whether altering the cap will promote the competition, diversity and localism goals on which the rule is based.[8] The Notice proposing to eliminate the UHF discount fails to address these issues.

Removing the UHF discount without determining if an amended national TV ownership rule serves the public interest also is contrary to the Communications Act. The recent Third Circuit Court of Appeals decision vacating the FCC's change in its attribution rules regarding TV joint sales agreements (JSAs) demonstrates the point. Just as the Court found that "[a]ttribution rules do not exist separately from the ownership rules to which they relate," and that "[i]f there were no ownership caps, there would be no need to have attribution rules,"[9] there would be no need to have the UHF discount if it were not for the national TV ownership cap. Observing that attributing TV JSAs modified the FCC's ownership rules by making them more stringent, the Third Circuit concluded that "unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that an expansion is in the public interest."[10] Similarly, the Commission cannot logically demonstrate that making the national TV ownership rule more stringent by removing the UHF discount serves the public interest without examining the cap itself and determining whether, at its current or at a revised level, the cap promotes the FCC's competition, localism and diversity goals in today's marketplace.[11]

Although the national TV cap is not required to be reviewed quadrennially under Section 202(h) of the 1996 Telecommunications Act,[12] all of the FCC's ownership rules must serve the public interest under the Communications Act of 1934 (Act). The "Commission's general rulemaking power is expressly confined to promulgation of regulations that serve the public

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[6] *See, e.g., AT&T Co. v. FCC*, 974 F.2d 1351, 1354-55 (D.C. Cir. 1992) (finding FCC order arbitrary and capricious when the agency insisted that its order merely "clarified," rather than changed, a prior rule); *Verizon Telephone Companies v. FCC*, 570 F.3d 294, 394 (D.C. Cir. 2009) (finding FCC order arbitrary and capricious where the FCC without explanation "applied newly dispositive factors as if that had always been its method" of analyzing marketplace competition).

[7] An agency changing course must "supply a reasoned analysis for the change." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42 (1983). In fact, an agency must provide a more detailed justification for changing policy "when its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009). *Accord Encino Motorcars, LLC v. Navarro*, No. 15-415, at 9-10 (Sup. Ct. June 20, 2016).

[8] *See Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Memorandum Opinion and Order, 100 FCC 2d 74, ¶¶ 35-40 (1985); *1998 Biennial Regulatory Review*, Biennial Review Report, 15 FCC Rcd 11058, ¶ 30 (2000); *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, ¶ 539 (2003).

[9] *Prometheus III* at 53.

[10] *Id*. at 52.

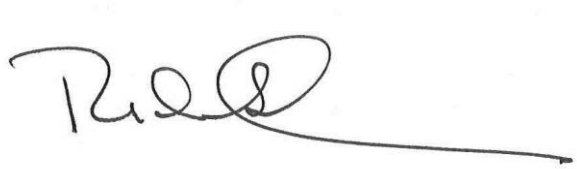
[11] As stated in earlier comments, NAB takes no position as to whether the national TV ownership cap should be maintained at its current level, modified to a different level or eliminated entirely. NAB 2013 Comments at 2.

[12] *See* Section 629, 2004 Consolidation Appropriations Act, P.L. 108-199, 118 Stat. 3, 99-100 (Jan. 23, 2004).

interest."[13] The Commission adopted the ownership rules specifically under its authority in Title III of the Act to make rules and regulations, including those regarding the licensing of broadcast stations, in the public interest – and the courts have upheld the FCC's authority to adopt ownership regulations on that basis.[14]

In light of the Act, long-standing precedent and the recent *Prometheus* decision, the Commission cannot make an end run around the statutorily-required public interest analysis and amend the national TV ownership cap without finding that an altered cap serves the goals of the ownership rules and the public interest. Just as FCC attribution decisions are not separate from its ownership rules,[15] the Commission cannot treat a decision eliminating the UHF discount as separate from its national TV ownership rule and thereby avoid a public interest analysis of that rule. Because the "Commission is statutorily bound to determine" whether the "vital link between [its] regulations and the public interest" exists,[16] a failure to make that required determination with regard to an amended national TV ownership cap will not withstand judicial scrutiny.

Respectfully submitted,



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[13] *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (citing Section 303(r) of the Act, which provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall," *inter alia*, "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

[14] *See, e.g., FCC v. NCCB*, 436 U.S. 775, 793-94 (1978) (upholding adoption of the newspaper/broadcast cross-ownership rule under the FCC's authority to "issue regulations codifying its view of the public-interest licensing standard"); *NBC v. U.S.,* 319 U.S. 190, 215-18 (1943) (stating that the "criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity,'" and upholding adoption of the FCC's chain broadcasting rules as a permissible exercise of that authority); *U.S. v. Storer Broadcasting Co*., 351 U.S. 192, 203 (1956) (concluding that the FCC had authority to impose rules limiting the multiple ownership of AM, FM and TV stations under its public interest rulemaking and licensing authority).

[15] *Prometheus III*, at 53.

[16] *Geller*, 610 F.2d at 980. *Accord Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 881-82 (D.C. Cir. 1999) (stating that the "FCC is bound to regulate in the public interest," and rejecting the FCC's explanation of "why the public would benefit" from two rules challenged by broadcasters).

cc: Bill Lake, Mary Beth Murphy, Brendan Holland